CAB Associates *and* Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO. Case 29–CA–24331

December 31, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On July 2, 2002, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent, CAB Associates (CAB), violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO (the Union) and by refusing to adhere to the terms of a collective-bargaining agreement, effective July 1, 1999, through June 30, 2002, between the Union and the General Contractors' Association of New York, Inc. (GCA), which CAB adopted by its conduct. We affirm the judge's violation finding, and we adopt his analysis except as stated below.

I. THE 10(B) ISSUE

CAB contends, inter alia, that the complaint was untimely under Section 10(b) of the Act. For the reasons explained below, we agree with the judge's finding that the complaint was not time barred.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] As explained in part II below, we shall amend the judge's remedy to conform to our findings and to the Board's standard remedial language, and to provide for the appropriate method of calculating backpay. We shall also modify the judge's recommended Order to conform to the amended remedy, and in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001); and we shall substitute a new notice.

A. Facts

At all material times, CAB, whose principals are Charles and Brian Warshaw, was a member of the GCA, a multiemployer association. The GCA and the Union have been parties to several collective-bargaining agreements under Section 8(f) of the Act, including agreements effective July 1, 1996, through June 30, 1999 (the 1996–1999 agreement), and July 1, 1999, through June 30, 2002 (the 1999–2002 agreement). Effective June 30, 1996, CAB withdrew authority from the GCA to bargain with the Union on its behalf. Nevertheless, CAB adhered to the terms and conditions of the 1996–1999 agreement and also, for a time, the terms and conditions of the 1999–2002 agreement.

The 1999–2002 agreement required signatory employers, inter alia, to employ on-site union stewards on jobs costing at least $14 million, to pay on-site stewards an extra dollar an hour, and to deduct and remit union dues. During the latter half of 1999—i.e., the first 6 months of the 1999–2002 agreement—CAB employed John Wichrowski and Richard Wozlonis at its Herricks Road and World Trade Center jobs, respectively, where they served as on-site union stewards. CAB paid them an extra dollar an hour, and deducted and remitted union dues. During the same timeframe, however, CAB did not employ an on-site union steward on its 14th Street job, which also cost more than $14 million. Indeed, CAB had never employed an on-site steward on its 14th Street job, which began in 1995. Near the end of December 1999, Wichrowski and Wozlonis were laid off. According to the credited testimony, Brian Warshaw told them that the layoffs were due to lack of work, but that CAB hoped to get more work, and when it did, they would be recalled.

On July 8, 1999, the GCA sent the Union a list of employers that had authorized the GCA to represent them in the negotiation, execution, and administration of the 1999–2002 agreement. CAB was not on that list. On January 19, 2000, the Union sent CAB a letter demanding that it sign an independent agreement, copies of which were enclosed. CAB did not respond to this demand.

From late December 1999 until January 2001, the Union was unaware of work being performed by CAB requiring bargaining-unit employees, and it was also unaware of any contracts being awarded CAB that would require it to hire unit employees. In January 2001, Union Secretary-Treasurer Thomas Gesualdi learned that CAB had won a $25 million contract. Gesualdi phoned Charles Warshaw and asked him to recall Wozlonis from layoff so that the Union could appoint Wozlonis as its on-site steward for this new job. Warshaw refused, say-

ing that he did not have a contract with the Union. The judge's unexcepted-to finding was that CAB has not complied with the 1999–2002 agreement since January 21, 2001. The Union's charge alleging a violation of Section 8(a)(5) was filed on July 9, 2001, and served on CAB July 11, 2001.

B. Discussion

The 6-month limitations period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice of a violation of the Act. See, e.g., *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). The requisite notice may be actual or constructive. In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence. See, e.g., *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992). Constructive notice will not be found where a "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct." *A & L Underground*, 302 NLRB 467, 469 (1991).

CAB contends that the 10(b) period began to run when it failed to respond to the Union's January 19, 2000 letter demanding that CAB sign an independent agreement. The judge rejected this contention, relying in part on *Christopher Street Corp.*, 286 NLRB 253 (1987),[3] and reasoning that the Union could have reasonably believed that CAB needed time to consider whether or not to sign a contract directly with the Union. In this respect only, we disagree with the judge's rationale. In *Christopher Street*, supra, the union sent the respondent a letter that presented alternatives: sign an industrywide contract, or negotiate a separate agreement. The respondent failed to reply. Under those circumstances, the Board found that the respondent's silence did not put the union on notice of an 8(a)(5) violation because "the [u]nion could reasonably believe that the [r]espondent needed time to consider whether to sign the industrywide contract." Id. at 253. Here, by contrast, the Union knew that CAB had withdrawn the GCA's authority to bind it to the 1999–2002 agreement. Thus, the Union offered the Respondent no alternatives, but simply demanded that it sign an independent agreement.

Nevertheless, we agree with the judge that prior to Charles Warshaw's express repudiation of the 1999–2002 agreement, CAB's conduct was ambiguous and, thus, failed to give the Union the requisite constructive notice. See *A & L Underground*, supra. CAB failed to reply to the Union's January 19, 2000 demand that it sign an independent agreement. On the other hand, it complied with the 1999–2002 agreement by employing Wichrowski and Wozlonis as on-site union stewards on two of its jobs, by paying them an extra dollar an hour, and by deducting and remitting union dues. In addition, when it laid off Wichrowski and Wozlonis at the end of 1999, it gave no indication that it meant to repudiate the 1999–2002 agreement or withdraw recognition from the Union. On the contrary, it stated that the layoffs were due to lack of work, and that Wichrowski and Wozlonis would be recalled when new work was obtained. The Union might have considered following up on its January 19, 2000 letter. However, in light of CAB's conflicting signals, CAB's failure to respond to that letter did not suffice to put the Union on constructive notice of an 8(a)(5) violation.

CAB contends that additional events also started the 10(b) period running more than 6 months before the filing and service of the charge, namely, (1) its refusal to maintain Wichrowski as on-site steward at the Herricks Road job in 2000, and (2) its refusal to submit contributions to the Local 282 benefit funds or dues checkoffs to the Union after December 1999.[4] These contentions are without merit. As to (1), when Wichrowski was laid off from the Herricks Road job in December 1999, he was told that there was no more work; and CAB did not except to the judge's finding that from December 1999 to January 2001, the Union was unaware of work being performed by CAB requiring unit employees. As to (2), under the 1999–2002 agreement, CAB would owe no fund contributions or dues checkoffs if it had no work requiring unit employees; and again, from December 1999 to January 2001, the Union was unaware of work being performed by CAB requiring unit employees. Under these circumstances, the mere fact that the Herricks Road job lasted into 2000, or that CAB paid no fund contributions or dues checkoffs after December 1999, could not put the Union on constructive notice of an 8(a)(5) violation.

II. THE JUDGE'S REMEDY

Paragraph 1 of the judge's remedy states, inter alia, that the Respondent "shall be ordered to revoke its withdrawal of recognition of the Union and instead recognize and bargain with the Union." Paragraph 2(a) of the

[3] Enfd. mem. 847 F.2d 835 (2d Cir. 1988).

[4] Two other events cited by CAB as triggering the 10(b) period—its refusal, in 2000, to employ Wozlonis as an on-site steward at the 14th Street project, and its withdrawal of bargaining authority from the GCA—are fully dealt with by the judge, whose analysis we have adopted (except as otherwise provided herein). With regard to the 14th Street project, however, it is worth emphasizing that CAB had never employed an on-site steward there since the job began in 1995. Thus, its continuing refusal to do so would not have alerted the Union that CAB was repudiating the contract.

judge's recommended Order provides accordingly. CAB excepts. As the judge found, the bargaining relationship between CAB and the Union was governed by Section 8(f). Thus, when the 1999–2002 agreement expired on June 30, 2002, either party was free to repudiate the relationship. See *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Under these circumstances, we find merit in CAB's exception, and we will amend the remedy and modify the recommended Order accordingly to omit any requirement of recognition or bargaining. We will, however, require CAB to fulfill its outstanding obligations under the 1999–2002 agreement.

The judge's remedy also provides that individuals who should have been but were not assigned work on CAB's projects under the terms of the 1999–2002 agreement are to be made whole in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970).[5] The *Ogle Protection* formula applies only to remedy a violation of the Act that does not involve cessation or denial of employment. To the extent that CAB's unlawful repudiation of the 1999–2002 agreement resulted in denial of employment—including but not limited to CAB's refusal to recall Wozlonis from layoff in January 2001—that is appropriately remedied under the quarterly backpay formula prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). See *Raven Government Services*, 336 NLRB 991, 992 (2001), enfd. 315 F.3d 499 (5th Cir. 2002). To the extent, if any, that CAB's unlawful conduct resulted in employees receiving less than they would have been entitled to for their work had the Act not been violated, those losses are properly remedied under the *Ogle Protection* formula. We are unsure whether there are any employees in this case who are entitled to backpay under the latter formula. However, we shall amend the remedy to provide for both backpay formulas and leave this issue to compliance.

AMENDED REMEDY

Substitute the following for the first three paragraphs of the remedy section of the judge's decision.

"Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. With respect to the latter, the Respondent shall be ordered to fulfill its obligations under the 1999–2002 collective-bargaining agreement between the General Contractors' Association and Local 282, which the Respondent adopted by its conduct.

"The Respondent shall also be ordered to make whole all individuals represented by the Union who were denied employment on the Respondent's projects as a result of its unlawful failure to comply with the terms of the 1999–2002 agreement, in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent, if any, that the Respondent's unlawful conduct resulted in employees receiving less than they would have been entitled to for their work had the Act not been violated, the Respondent shall be ordered to make those employees whole in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

"Furthermore, the Respondent shall be ordered to make whole the appropriate union benefit funds for losses suffered as a result of the Respondent's delinquencies in failing to make contractually required contributions to those funds under the 1999–2002 agreement, including paying any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees and/or other individuals for any expenses ensuing from its failure to make such required contributions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981)."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, CAB Associates, College Point, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO.

(b) Unlawfully refusing to adhere to the terms of the 1999–2002 collective-bargaining agreement between the General Contractors' Association of New York, Inc. and Local 282, which the Respondent adopted by its conduct, covering the following unit:

> All automobile chauffeurs and euclid and turnapull operators employed by the Respondent at its College Point facility, excluding office clerical employees, guards and supervisors as defined by Section 2(11) of the Act.

[5] Enfd. 444 F.2d 502 (6th Cir. 1971). There are no exceptions to this part of the remedy section of the judge's decision. However, the Board may address remedial matters in the absence of exceptions. See, e.g., *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996).

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Fulfill its obligations under the aforesaid agreement.

(b) Make whole the unit employees and/or other individuals for any losses suffered as a result of its failure to adhere to the terms of the aforesaid agreement, in the manner set forth in the remedy section of this decision.

(c) Make whole the union benefit funds for any losses suffered as a result of its failure to adhere to the terms of the aforesaid agreement, and reimburse the unit employees and/or other individuals for any expenses resulting from its failure to make the required fund contributions, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its College Point, New York place of business copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2001.

(f) Within 14 days after service by the Region, return to the Regional Director sufficient copies of the notice, after being signed by the Respondent's authorized representative, for posting by the Union, if it is willing, at all locations where notices to its members are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 2003

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully withdraw recognition from Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT unlawfully refuse to adhere to the terms of the 1999–2002 collective-bargaining agreement between the General Contractors' Association of New York, Inc. and Local 282, which we adopted by our conduct, covering the following unit:

All automobile chauffeurs and euclid and turnapull operators employed by us at our College Point facility,

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

excluding office clerical employees, guards and supervisors as defined by Section 2(11) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL fulfill our obligations under the aforesaid agreement.

WE WILL make whole our employees and/or other individuals, with interest, for any losses suffered as a result of our failure to adhere to the terms of the aforesaid agreement.

WE WILL make whole the union benefit funds for any losses suffered as a result of our failure to adhere to the terms of the aforesaid agreement, and WE WILL reimburse our employees and/or other individuals, with interest, for any expenses resulting from our failure to make the required fund contributions.

CAB ASSOCIATES

Amy J. Gladstone, Esq. and *Lorraine Hoffman, Esq.*, for the General Counsel.

Richard B. Ziskin, Esq. and *Robert M. Ziskin, Esq. (Law Office of Robert M. Ziskin)*, for the Respondent.

Bruce L. Levine, Esq. (*Cohen, Weiss & Simon, LLP*), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed by Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO (the Union) on July 9, 2001, against Cab Associates (the Respondent), a complaint and notice of hearing was issued on October 30, 2001, alleging that the Respondent, by withdrawing its recognition of the Union and by failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the National Labor Relations Act (the Act), thereby violated Section 8(a)(1) and (5) of the Act. By answer timely filed the Respondent denied the material allegations in the complaint and raised several affirmative defenses.

A hearing in this matter was held before me in Brooklyn, New York, between January 16 and March 5, 2002. Subsequent to the close of the case, the General Counsel, the Union and the Respondent filed briefs.

On the entire record[1] and the briefs of the parties, and upon my observation of the witnesses, I make the following:

[1] By motion dated May 6, 2002, counsel for the General Counsel moved to amend the transcript. There being no opposition thereto, the proposed corrections being mainly of a spelling or grammatical nature without affecting any substantive changes, I hereby grant the motion to amend the transcript. See Attachment 1 [omitted from publication].

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a domestic corporation, with its principal office and place of business located at 18–21 126th Street, College Point, New York (College Point facility), has been engaged in the business of general contracting in the construction business. During the past year, the Respondent, in the course and conduct of its business operations, purchased and received goods and material at the College Point facility valued in excess of $50,000 directly from points located outside the State of New York. The complaint alleges, the Respondent admits and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that Charles Warshaw and Brian Warshaw "administrators" of the Respondent, at all times material, have been agents of the Respondent, acting on its behalf.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that the Union at all material times, has been a labor organization within the meaning of Section 2(5) of the Act. The amended complaint alleges that the unit of the Respondent's employees (the unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All automobile chauffeurs and euclid and turnapull operators employed by the Respondent at the College Point facility, excluding office clerical employees, guards and supervisors as defined by Section 2(11) of the Act.

The amended complaint also alleges that during the 1996–1999 and 1999–2002 Agreements, the Union has been the "limited exclusive collective-bargaining representative" of the unit based on Section 9(a) of the Act.

The motion to amend the complaint

By letters dated January 22 and January 28, 2002, counsel for the General Counsel moved to amend the complaint stating:

> Based upon evidence that Counsel for the General Counsel has recently uncovered, the General Counsel is hereby withdrawing its theory that Respondent's violation of Section 8(5) of the Act is based on Respondent's failure to comply with the requirements of Retail Associates,[2] that is, Respondent's failure to provide the Union with written notification of its withdrawal from the General Contractor's Association prior to the commencement of negotiations for the 1999-2002 collective-bargaining agreement with the General Contractor's Association. Henceforth, the General Counsel will proceed solely on its alternative theory that Respondent, by its Conduct, adopted both the 1996 and 1999 collective-bargaining Agreements between

[2] *Retail Associates, Inc.*, 120 NLRB 388 (1958). The amended complaint deleted and withdrew the allegation that the Respondent is bound by the 1999–2002 Association Agreement by virtue of its membership in and/or authorization to the General Contractor's Association.

the Union and the General Contractor's Association. See *E.S.P. Concrete Pumping, Inc.*, 327 NLRB 711 (1999).[3]

The amended complaint alleges in substance that the Respondent, by its acts and conduct, adopted the terms of the 1996–1999 and 1999–2002 collective-bargaining agreements between the General Contractor's Association (GCA) and the Union; since January 21, 2001 has refused to adhere to the 1999–2002 collective-bargaining agreement; has unlawfully withdrawn recognition from the Union in January 2001, and by these acts has failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act. [4]

The motion to amend the complaint was made by counsel for the General Counsel after the General Counsel had rested her case but reserved the right to call rebuttal witnesses, and both the Union and the Respondent had also rested their cases. This matter was then adjourned on January 17, 2002 to February 4, 2002, for the testimony of any rebuttal witnesses.

By letters dated January 23 and January 29, 2002, the Respondent stated that it "supported General Counsel's position to withdraw its theory that Respondent's alleged violation of Section 8(a)(5) was based on the Respondent's alleged failure to comply with the requirements of Retail Associates, specifically, the Respondent failed to provide Local 282 with written notification of its withdrawal from the General Contractor's Association ('GCA') prior to the commencement of the 1999–2002 negotiations for the collective–bargaining agreement between Local 282 and the GCA."

However, the Respondent objected to the granting of the General Counsel's motion to amend the "entire substantive portion of the Complaint with an alternative and inconsistent theory from the original," pursuant to Section 102.17 of the Board's Rules and Regulations which allows amendments to complaints, "upon such terms as may be deemed just," since General Counsel was seeking to amend the complaint at the conclusion of the Respondent's defense to the General Counsel's case in-chief and the Respondent would be "severely prejudiced by General Counsel's attempted amendments," citing *New York Post Corp.*, 283 NLRB 430 (1987).

The Respondent maintains that the delay by General Counsel in making its motion to amend the complaint until the entire trial record was completed except for rebuttal witnesses, and without any attempt to explain or justify the delay between the time it first learned or should have known of the alternative theory and when the motion to amend the complaint was made, is of consequence, because during the trial the Respondent cross-examined the General Counsel's witnesses and presented its defense in its entirety without any knowledge that the General Counsel was going to amend the complaint after the Respondent rested.

The Respondent also alleges that any argument by General Counsel that the matter was fully litigated or that the amendment is in essence a motion to conform the pleadings to the evidence and that the amendment involves only a legal conclusion based on facts already in evidence is without merit, since the Respondent's case would have been changed, for example, its cross-examination of General Counsel's witnesses, might have been different had it been aware of the new allegations.

The Respondent's assert that counsel for the General Counsel has not justified the delay occurring between the time she knew or should have known of the alternative theory and the time notice was given to the Respondent of the intention to amend the complaint. For such an amendment to be just pursuant to Section 102.17 of the Board's Rules and Regulations, the General Counsel must justify last minute amendments. "Where no or insufficient explanation is given for a prosecutorial delay in preparing an amendment to the complaint or informing the Respondent that such an amendment will be prepared, there can be no doubt that delay on the part of the government in preparing its amendment to the complaint was used to gain an advantage over Respondent: Citing, *Consolidated Printers, Inc.*, 305 NLRB 1061 (1992).

The Respondent also states that the General Counsel's alternative theory that the Respondent adopted both the 1996–1999 and 1999–2002 collective-bargaining agreements between Local 282 and the GCA is "time-barred under Section 10(b) of the Act."

Counsel for the General Counsel explains in her brief that the motion to amend the complaint to delete the General Counsel's allegations in the complaint that the Respondent untimely withdrew from the GCA without providing the Union with adequate notice under Retail Associates, Inc., 120 NLRB 388 (1958), was based on evidence counsel for the General Counsel did not discover until after the trial began.

Asserting that after the close of the second day of trial, January 17, 2002, counsel for the General Counsel had the opportunity for the first time to examine the four collective-bargaining agreements between the Union and the GCA. Previously, during the Board's investigation, in this matter, the Union was able to provide only the most recent collective-bargaining agreement, the 1999–2002 agreement, since the earlier agreements had been filed away in storage. Since the 1999–2002 Agreement states that the Respondent recognizes the Union under Section 9(a) of the Act, the Union was under the assumption

[3] In *E.S.P. Concrete Pumping, Inc.*, supra, the Board held that the principles of "adoption by conduct" of a collective-bargaining agreement, properly understood, are applicable to agreements covered by Section 8(f) as well as Section 9(a), and that once an employer had voluntarily adopted a contract, it is foreclosed under *John Deklewa & Sons* [282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988)] from repudiating it during its term.

Arco Electric v. NLRB, 618 F.2d 698 (10th Cir. 1980) (whether particular conduct in a given case demonstrates the existence or adoption of a contract is a question of fact); enfg. 237 NLRB 708 (1978). *Lozano Enterprises v. NLRB*, 327 F.2d 814 (9th Cir. 1964) (in deciding whether an employer and a union have agreed upon a contract the Board is not bound by the technical rules of contract law); *NLRB v. Truckdrivers Local 100*, 532 F.2d 569, 571 (6th Cir. 1976), cert, denied 429 U.S. 859 (1976) (same).

See also, *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989).

[4] The Union raised no objection to the proposed amendments to the complaint but "does not agree . . . with the General Counsel's decision to withdraw one of the two theories, that is the Respondent was bound as a member of the Association to the multi employer agreement. Its Local 282's position that this still is the case. However, we are deferring to the General Counsel's decision to withdraw that without subscribing to the conclusions they apparently have reached."

that it maintained 9(a) status throughout its collective-bargaining relationship with the Respondent and the General Counsel proceeded based upon that representation. However, after the second day of trial, upon reviewing the GCA collective-bargaining agreements for 1990–1993, 1993–1996, and 1996–1999, counsel for the General Counsel found that during the period of the first three agreements, the Union's status as a bargaining representative was covered by Section 8(f) of the Act not Section 9(a).

Moreover, counsel for the General Counsel citing the Board's holding in *Central Illinois Construction*, 335 NLRB No. 59 (2001), alleges that the language in the 1999–2002 Agreement[5] failed to adequately convert the Union's relationship with the Respondent from one governed by Section 8(f) of the Act, to one under Section 9(a) of the Act. In *Central Illinois Construction*, the Board adopted the standards articulated by the United States Court of Appeals in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000) and *Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000) which provide that a parties' recognition agreement or contract will independently establish a union's 9(a) status were the language in the contract unequivocally indicates that: (1) the union requested recognition as majority or as the 9(a) representative of the unit employees; (2) the employer recognizes the union as the majority or as the 9(a) representative, and (3) the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support. *Central Illinois Construction*, supra at 4. The provision in the 1999–2002 Agreement fails to establish an intent to create a Section 9(a) relationship.[6]

Continuing her explanation, counsel for the General Counsel then moved, by letters dated January 22 and January 28, 2002 to amend the complaint to delete its theory, based on the mistaken assumption that the parties maintained a Section 9(a) relationship, and that the Respondent untimely withdrew from the GCA without providing the Union with adequate notice under *Retail Associates, Inc.*, supra,[7] counsel for the General Counsel therein moved to further amend the complaint to assert that the Union has had limited Section 9(a) status for the periods July 1, 1996 to June 31, 1999, and July 1, 1999 to June 30, 2002, and to state the General Counsel's remaining basis for finding the Respondent's withdrawal of recognition of the Union unlawful, by virtue of the fact that the Respondent had adopted the 1999–2001 collective-bargaining agreement.

By conference call with the parties on January 31, 2002, I granted the General Counsel's motion to amend the complaint over the objection of the Respondent, as set forth above. At the opening of the hearing on March 4, 2002, I again granted the General Counsel's motions to amend the complaint. I then granted the Respondent an adjournment to "prepare its case with regard to any defense to the amended complaint. While maintaining its objections to the amended complaint, CAB presented its defense to the amended complaint on March 5, 2002, the final day of the hearing."

As set forth above, the Respondent relies primarily on Section 102.17 of the Board's Rules and Regulations and two cases, *Consolidated Printers, Inc.*, 305 NLRB 1061 (1992), and *New York Post Corp.*, 283 NLRB 430 (1987), to support its position that the administrative law judge should not have granted the General Counsel's motion to amend the complaint as untimely.

Section 102.17 permits the amendment of a complaint, before, during or after a hearing "upon such terms as may be deemed just." In *Consolidated Printers, Inc.* 305 NLRB 1064, the Administrative Law Judge with Board approval stated:

> The Board in New York Post reversed an administrative law Judge who had allowed a last-minute amendment to the complaint over the objection of the respondent . . . . The Board particularly noted that the General Counsel had without explanation waited until the last minute to add the allegation. 283 NLRB at 431.
>
> In the instant case Counsel for the General Counsel contends that he learned of Respondent's defense only at the trial. Counsel for the General Counsel does not explain however the delay between the time he learned of the nature and theory of Respondent's defense and the time he first made his motion after the entire trial record had been made and the hearing was to be closed. That delay is of consequences because during that interim period counsel for Respondent cross-examined the General Counsel's witnesses and presented his defense in its entirety without any knowledge that the General Counsel was intending to move to amend the complaint to allege that portions of Respondent's defense were independently violative of the Act.

The instant case is distinguishable from the above cases in several aspects and this constitutes the basis for my granting the General Counsel's motion to amend the complaint as indicated herein. In this case, counsel for the General Counsel's motion to amend the complaint to delete the Retail Associates, supra, allegations of lack of notice of the Respondent's withdrawal from the GCA was based on evidence counsel for the General Counsel did not discover until after the trial began. Moreover, the General Counsel's motion to amend the complaint to allege the "adoption of conduct" theory was based on evidence adduced in substantial part from the Respondent's own witness, Charles Warshaw's testimonial admissions after the second day of the trial.

---

[5] The recognition clause in the 1999–2002 collective-bargaining agreement reads as follows:

> The Union claims, and the Employer acknowledge and agrees, that a majority of the Employees have authorized the Union to represent them in collective bargaining. The Employer hereby recognizes the Union as the exclusive collective-bargaining representative under Section 9(a) of the National Labor Relations Act of all automobile chauffeurs and euclid and turnapull operators employed by the Employer.

[6] This provision neither states that the Union requested recognition as a majority or as the 9(a) representative of the unit employees nor does it state that recognition was based on the Union's having shown, or having offered to show, evidence of majority support.

[7] An employer is not required to give the Union timely notice of its withdrawal from an association when the parties maintain a Section 8(f) relationship.

Whether it is just to grant a motion to amend a complaint when the motion is made during or after a hearing depends on factors such as surprise or lack of notice *Nestle Co.*, 248 NLRB 732 fn. 3 (1980); *Douglas & Lomason Co.*, 253 NLRB 277, 279 fn. 6 (1980); whether the General Counsel offered a valid excuse for failing to make the motion earlier (*Douglas & Lomason Co.*, supra); *Trans-States Lines*, 256 NLRB 648 fn. 3 (1981); and whether the matter was fully litigated *La Famosa Foods*, 282 NLRB 316, 330 (1986); *Douglas & Lomason Co.*, supra; *Nestle Co.*, supra; *Ace Drop Cloth Co.*, 178 NLRB 664 fn. 1 (1969).

In the present case, the General Counsel's motion to amend the complaint to allege an "adoption by conduct" theory was based in strong part on the evidence of the testimonial admissions adduced from the Respondent's own major witness during the trial. Under these circumstances, there is no basis for a finding of surprise, lack of notice, or prejudice to the Respondent. See *Wilson & Sons Heating & Plumbing, Inc.*, 302 NLRB 802, 804 (1991), enfd. sub nom, *NLRB v. Amateyus, Ltd.*, 817 F.2d 996 (2d Cir. 1987), cert. denied 484 U.S. 925 (1987).

Also, at the commencement of the trial, in her opening statement, counsel for the General Counsel "made it very clear that adoption by conduct was one of the theories on which General Counsel was proceeding." The General Counsel not only presented evidence with regard to the "Retail Associates" theory as originally alleged in the complaint, but also as concerns the "adoption by conduct" theory, as subsequently alleged in the amended complaint, even before the complaint was amended. The record evidence shows that the Respondent's case and defense focused in substantial part on the General Counsel's "adoption by conduct" argument. Additionally, the matters at issue appeared to be fully litigated since all parties had the opportunity at the trial to present any available evidence relative to the alleged violation, the Respondent had the opportunity to cross-examine the General Counsel's witnesses on the "adoption by conduct" testimony, even before the motion to amend the complaint was addressed, and the Respondent's main witness, Charles Warshaw, testified considerably on this issue.

Additionally, it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses. *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989); *Timken Co.*, 236 NLRB 757 (1978), enf. denied on other grounds 652 F.2d 610 (6th Cir. 1981); *Crown Zellerbach Corp.*, 225 NLRB 911, 912 (1976).

III. THE ALLEGED UNFAIR LABOR PRACTICES

The evidence

The General Contractors Association of New York, Inc. (GCA) is an organization representing contractors in the City of New York in the heavy construction industry in negotiating and administering collective-bargaining agreements with unions, covering construction work on roads, bridges, tunnels, building foundations and excavations. The GCA has 110 active members. An additional 450 companies designate the GCA to represent them through collective-bargaining designation forms, but are not active or associate members. According to the GCA Constitution and by-laws, mere membership in the GCA does not grant the employer association authority to act on an employer-member's behalf in collective-bargaining negotiations. The only grant of that authority is the GCA designation form by which a member-employer authorizes the GSA to bargain on its behalf with the unions listed on the authorization form except for those unions that the employer-member may cross out and have initialed. Anthony Saparito, GCA Assistant Director of Labor Relations [8] for the past three years, testified that unions frequently ask the GCA for a current list of authorized contractors, who have designated the GCA to bargain for them whereupon the GCA sends the unions such an updated listing. The GSA sends updated lists to the various unions when it negotiates a new contract. The GSA also send out a letter when a new company wants to be added or deleted from the authorization list.

The Respondent first authorized the GCA to act as its collective bargaining representative on August 2, 1990. At all material times herein, the Respondent has been a member of the GCA. On March 22, 1991, the Respondent voluntarily recognized the Union as the collective-bargaining representative of a unit of employees consisting of automobile chauffeurs and euclid and turnapull operators employed by the Respondent, herein called the Unit. These employees drive materials to and from the Respondent's jobsites. Since the date of recognition, the GCA and the Union have been parties to four collective-bargaining agreements, the first being effective from March 22, 1991 to June 30, 1993. This contract was similar to the contract negotiated by the Union and the GCA on behalf of the GCA's members at that time. By letter dated October 22, 1991, sent to Theresa Cody, a Union Trust Fund employee in charge of maintaining the Union's contracts, the GCA notified the Union that it was authorized to bargain with the Union on behalf of the Respondent.

In October 1991, the Respondent hired John Wichrowski as a Unit driver at its Queens Plaza project. From the commencement of his employment with the Respondent until his layoff on December 28, 1999, Wichrowski also worked as an on-site-steward for the Union, checking all-trucks that came onto the jobsite to ensure that they were Union affiliated and that deliveries were safely made. Wichrowski received an additional $1.00 per hour from the Respondent for this work pursuant to the collective-bargaining agreement.

The Respondent and the Union were parties to a second collective-bargaining agreement, effective from July 1, 1993 to June 30, 1996, negotiated by the GCA on behalf of the Respon-

[8] Saparito's duties include the administration of the GCA's labor contracts, safety issues, grievances and arbitration. With respect to union negotiations, the GCA generally puts together a committee of contractors who negotiate with various unions for new contracts. Saparito and Theodore King, the GCA Director of Labor Relations, act as spokesmen and prepare proposals to present to the unions.

dent. In May 1993, the Respondent hired Richard Wozlonis to work for it as a Unit driver for its subway rehabilitation project at the World Trade Center.

By letter dated February 22, 1994, the Respondent's administrator, Charles Warshaw, requested that the GCA remove the Respondent from the list of authorized contractors with the Union. On March 1, 1994, A. E. Gattler, then Assistant Director of Labor Relations for the GCA, by letter to Warshaw, acknowledged receipt by the GCA of the Respondent's withdrawal of its bargaining authorization with the Union, and informed Warshaw that the Respondent's withdrawal would be effective June 30, 1996, the date of the expiration of the 1993–1996 collective-bargaining agreement. It is undisputed that, at that time, neither the Respondent nor the GCA informed the Union of this withdrawal of bargaining authority effective at the expiration of the GCA 1993–1996 Agreement.

The GCA and the Union negotiated a third collective-bargaining agreement effective from July 1, 1996 to June 30, 1999. On August 8, 1996, the GCA sent Theresa Cody, a Union Trust Fund employee, the GCA's contractor employer authorization list. The Respondent was not listed as a contractor on this list. The evidence indicates that the records of the GCA do not reflect any documents or designation forms, which would have granted the GCA authority to bargain on behalf of the Respondent with the Union after March 1, 1994.[9]

While Charles Warshaw testified that after 1996, the Respondent no longer had any contractual obligation with the Union, the evidence shows that from July 1, 1996 to June 30, 1999, the Respondent continued to adhere to all the terms and conditions of the 1996 collective-bargaining agreement. In this regard, throughout the entire term of the 1996 Agreement, the Respondent paid employees Wichrowski and Richard Wozlonis the wage rates required by this Agreement, which included an additional $1.00 per hour to Wichrowski for acting as the Union's on-site steward at the Respondent's Herrick's Road jobsite. Additionally, the Union's Fund's records reflect that throughout the 1996–1999 contract period, the Respondent submitted the requisite forms to the union building fund and benefit contributions to the Union required by the 1996 collective-bargaining agreement.[10] The Respondent also deducted dues from Wichrowski and Wozlonis' paychecks and remitted them to the Union. At no time throughout the term of the 1996 Agreement did the Respondent advise the Union, in any manner, that it had withdrawn recognition from the Union.

In 1997, Richard Wozlonis began working for the Respondent on the Respondent's subway rehabilitation at the World Trade Center and while also the Union's on-site-steward received an extra $1.00 per hour pursuant to the 1996–1999 collective-bargaining agreement. The Respondent was the general contractor at the World Trade Center subway renovation and construction project and had a contract with the Metropolitan Transit Authority (MTA) to do the work. Charles Warshaw testified that the MTA is a public agency and the Respondent was obligated to pay its employees including Wozlonis the prevailing wage rates and benefits as set forth in the job bid book.

The Respondent also received a 14th Street subway construction project in Manhattan contract with the MTA ($21,000,000) from 1995 to 1999. Warshaw testified that prior to 2000, the Union requested that the Respondent employ an on-site steward at the 14th Street and World Trade Center projects. The Respondent never employed a union on-site-steward at the 14th Street project. Brian Warshaw testified that both Wichrowski and Wozlonis inquired about work on the 14th Street site and Warshaw informed them individually that there was no need for a truckdriver at the 14th Street job. Charles Warshaw testified that on two or three occasions, in early 2000, Thomas Geswualdi a union official asked that Warshaw employ Wozlonis as an on-site steward at the 14th Street project, but Warshaw refused Gesualdi's request. The evidence shows that from July 6, 1999 to April 3, 2001, the Respondent did not employ a union on-site-steward or a Local 282 truckdriver on the 14th Street project in Manhattan.

On April 1, 1999, 90 days prior to the expiration of the 1996–1999 Agreement, the Union by letter notified the Respondent that it was prepared to meet to negotiate a new agreement. The Respondent did not reply to the Union's letter nor inform the Union that it had withdrawn its recognition from the Union.

Subsequent to negotiations for a new collective-bargaining agreement between the GCA and the Union, these parties entered into the 1999–2002 agreement. To be attached to this agreement was to be a list of employers who have authorized the GCA to bargain for them and therefore would be bound by the 1999–2002 collective-bargaining agreement. The GCA sent such an authorization list to the Union on July 8, 1999. The Respondent's name did not appear thereon. After the 1999–2002 agreement was executed, the Union sent a letter to all employers it felt bound by the new GCA agreement, both members and nonmembers, informing them of any new wage, pension, welfare, and annuity rates. While such a letter was sent to the Respondent by the Union, the Respondent did not respond to it nor inform the Union that it had withdrawn recognition from the Union. Union Secretary/Treasurer Thomas Gesualdi testified that the Union was not concerned at this point about it, since the Respondent was fully complying with all the changes contained in the 1999–2002 agreement and the Respondent had done nothing to alert the Union that it had withdrawn recognition from the Union.

Both Wichrowski and Wozlonis continued in the Respondent's employ after July 1, 1999, the date on which the 1999–2002 collective-bargaining agreement became effective. In compliance with the new contract changes the Respondent began to pay the new wage amounts and when due the agreements new pension and welfare rates.[11]

[9] By letter dated January 26, 2001, the GCA informed the Respondent that its records did not indicate the Respondent having a current, collective-bargaining agreement with the Union.

[10] The Respondent maintains that those payments were required under the New York State Department of Transportation and Metropolitan Transit Authority bid requirements and the union dues deductions and remittance was made by the employees own requests.

[11] Contributions to the Union's Pension Plan increased from $3.10 per hour to $4.00 per hour; the hourly rate for the Union's Welfare Fund decreased from $7.85 to $6.90; contributions to the Union's Job

Pursuant to a contract with the New York State Department of Transportation (NYSDOT) beginning in 1994 to construct a railroad bridge above Herricks Road in Nassau County, New York, the Respondent a general contractor employed various trades on the construction site including truckdrivers, engineers, laborers, carpenters, latherers, ironworkers, and painters.[12] John Wichrowski testified he had been employed by the Respondent on the Herrick's Road job since 1994 as a truckdriver and on December 28 or 29, 1999, the Respondent's Administrator Brian Warshaw approached him and told Wichrowski that there was no more work and he was sorry to have to let Wichrowski go. Wichrowski stated that Warshaw said that he hoped to get some new jobs and contracts and assured Wichrowski that when this happened, Wichrowski and some other laid off employees on that job would be recalled to work.[13] Wichrowski added that he was not surprised at this because the Herrick's Road job was approaching completion at the "punch list" stage of construction, ending stage of the work, and the Respondent was having financial problems because of an accident on one of the Respondent's jobs. It is undisputed that Brian Warshaw said nothing to Wichrowski about the Respondent having withdrawn its recognition of the Union at that time. Wichrowski related that he has not spoken to anyone at the Respondent since his layoff nor called to ask the Respondent to be placed on another job and to date, no one from the Respondent has contacted Wichrowski to return to work.

By letter dated January 14, 2000, the Respondent requested an extension of time at the Herricks Road project to complete additional work until April 30, 2000. Work on the Herricks Road job was completed in June 2000. During 2000 the Respondent did not employ any Local 282 truckdrivers or on-site stewards at the Herricks Road project.

Richard Wozlonis testified that during the last week in December 1999, Brian Warshaw approached him at the Respondent's College Point office and asked him if he had spoken to Wichrowski and then told him that, "Well, it looks like we are going to have to lay you off due to lack of work." Wozlonis related that Warshaw told him that when more work was secured, the Respondent would recall him to work. Wozlonis stated that he believed that the Respondent would call him back to work at some future time and was not surprised by his being laid off since the job he was working on at the World Trade Center was in the "clean up" stage at the end of the job. According to Wozlonis, Warshaw said nothing to him about the Respondent withdrawing recognition from the Union.

Wozlonis testified that he has not spoken to anyone at the Respondent since December 31, 1999 to ask to be put back to work on any job nor has the Respondent called him back to work. Brian Warshaw testified that aside from telling Wozlonis that he was being laid off for lack of work, he said nothing further to him about being recalled to work in the future.

On January 19, 2000, Cassel sent a letter to the Respondent stating that the Union was aware that the Respondent was no longer a member of the GCA and therefore requested that the Respondent must sign an enclosed Memorandum of Agreement between the Respondent and the Union. Cassel testified that she only sent letters to employers who were contractually bound to the Union. The Respondent neither signed the memorandum of agreement nor responded to the letter in any manner. Cassel never sent any further such letters to the Respondent. Gesualdi testified that, at that point in time, the Respondent's compliance with the terms of the 1999–2002 collective-bargaining agreement failed to alert the Union that the Respondent had withdrawn its recognition of the Union.

The GCA's most recent authorization form from the Respondent is dated April 24, 2000, and specifically excludes Local 282. On April 24, 2000, the GCA sent the Union a "Designation of the General Contractors Association of New York, Inc. as Bargaining Agents-Authorization." According to Gesualdi, the significance to the Union of the fact that the Respondent had excluded the Union, when it signed the authorization form, was that from April 24, 2000, on, the Respondent did not want the GCA to serve as its collective bargaining representative with the Union. Instead, the Respondent desired that the union contact it directly regarding negotiations or grievances. Gesualdi explained that this situation often arises in the construction industry.

Gesualdi testified that in early 2001 he learned from a Dodge Report, which lists contracts awarded to contractors, that the Respondent had won a bid from the MTA for the renovation of the Essex and Delancy Street subway station in Manhattan worth 25 million dollars. Gesualdi stated that under the terms of the 1999–2002 GCA-union collective-bargaining agreement the Respondent was required to employ an on-site steward on the Essex and Delancy Street job.[14] Gesualdi related that he then called Charles Warshaw and asked him to recall Wozlonis from layoff and the Union would appoint Wozlonis the on-site steward at the Essex and Delancy Street project. Gesualdi recounted that Warshaw's response was that he "wasn't recalling nobody" and he "don't have a contract with Local 282." Gesualdi testified that he was taken aback by Warshaw's comment because it was the first time Warshaw had said this to him and

Training Fund increased from $.05 to $.10 per hour; a vacation/sick leave contributions was established, for the first time, at the rate of $2.30 per hour. The wage rate of Wichrowski and Wozlonis was increased to $28.28 per hour plus $1.00 per hour for acting as on-site stewards as required by the 1999–2002 agreement.

Charles Warshaw testified that both Wichrowski and Wozlonis requested that the Respondent make their fringe benefit contributions to the union funds rather than to them as pay and this continued from July to December 1999. The Respondent also withheld union dues and remitted these to the Union at the employees requests.

[12] The NYSDOT bid book (agreement) required the Respondent to pay its truckdriver employees the prevailing wage and fringe benefits which on the Herricks Road project corresponded to the Union's current rates under the 1999–2002 GCA Agreement.

[13] Brian Warshaw denied telling Wichrowski that he would be recalled when the Respondent received some new jobs.

[14] Pursuant to the 1999–2002 GCA collective-bargaining agreement, any construction job worth more than $14 million requires the presence of a union on-site-steward on that job. Moreover, the 1999–2002 GCA agreement requires the Respondent to send notice of new jobs it obtains that requires the hire of unit employees. During the year 2000, the Union received no such notice. From December 1999 until January 2001, the Union was unaware of any work being performed by the Respondent requiring unit employees, nor was it aware of any contracts being awarded the Respondent for any major jobs during that period.

Gesualdi told Warshaw that he was mistaken, that the Respondent did have a contract with the Union.

By letter dated January 23, 2001, Gesualdi informed Warshaw that he believed that the Respondent was bound by the 1999–2002 collective-bargaining agreement with the GCA. Charles Warshaw responded to Gesualdis' letter by letter dated January 31, 2001 in which Warshaw stated that the Respondent was not bound by the 1999–2002 agreement and enclosed a letter from the GCA to the Respondent confirming receipt of the Respondent's February 22, 1994 letter which withdrew the GCA bargaining authorization for the Union, effective June 30, 1996; and a letter dated January 26, 2001, to Charles Warshaw, from the GSA stating that, according to its records, the Respondent does not have an agreement with the Union.

By letter dated February 5, 2001, Gesualdi advised Charles Warshaw that since the Union had never received any of the letters enclosed with Warshaw's letter of January 31, 2001, and since the Respondent has honored both the 1996–1999 and thus far, the 1999–2002 collective-bargaining agreements, the Respondent is bound by the 1999–2002 agreement. On March 29, 2001, Warshaw wrote to Gesualdi again stating that the Respondent does not have a collective-bargaining agreement with the Union, nor intends to have one now or in the future. It is undisputed that since January 21, 2001, the Respondent has not complied with the 1999–2002 GCA-Union collective-bargaining agreement.

On March 12, 2001, the Union filed a grievance against the Respondent for its failure to hire an on-site steward on the Essex and Delancy Street job. The nature of the grievance was that pursuant to the GCA agreement, the Respondent was to employ a Local 282 on-site steward on the project because it was a construction project in excess of $14 million and the Respondent had refused to do so. By letter dated March 29, 2001, Brian Warshaw informed Gesualdi that no agreement existed between the Respondent and the Union. After the Union's Labor Management Disputes panel met on April 10, 2001 regarding the grievance, at which the Respondent did not appear, it confirmed that if the Respondent has a collective-bargaining agreement with the Union, the Respondent would be required to employ a union on-site steward on the Essex and Delancy Street job since it was in excess of $14 million dollars. However, the panel elected to defer from making a decision pending the Board's determination in this case. By letter dated April 24, 2001, Gesualdi requested that the Respondent employ an on-site steward on the Essex and Delancy Street project pursuant to the panel award which the Respondent refused to do. The Union began picketing at the Essex and Delancy Street project but to date, the Respondent has continued to refuse to employ a union on-site steward at this jobsite nor has it offered employment to Wichrowski and Wozlonis since January 2001.

Charles Warshaw testified that the Respondent's contracts with the New York State Department of Transportation and the Metropolitan Transit Authority required it to pay its employees wages and benefits in accordance with the contract bid book. The bid books and prevailing wage rate law required the Respondent to pay its truckdrivers the equivalent rate as set forth in the 1999–2002 GCA agreement. Warshaw stated that the Respondent paid the prevailing wage rate and had to pay its truckdrivers as if they were working pursuant to the GCA agreement. However, neither the NYSDOT nor the MTA required the Respondent to become a signatory to the GCA agreement. Pursuant to the prevailing wage law, an employer may pay fringe benefits to the employee or to the union funds directly. Warshaw related that while the Respondent deducted union dues from its employees and forwarded them directly to the Union, and paid into the union funds directly for the employees, the Respondent's truckdrivers had requested the Respondent to do so rather than include this in their paychecks.

Credibility

As the credibility of the respective parties' witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *American Tissue Corporation*, 336 NLRB 1 (2002); *New York University Medical Center*, 324 NLRB 887 (1997); *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). I credit the testimony of the General Counsel's witnesses. Their testimony was given in a forthright manner, generally consistent and corroborative of each other, and consistent with other believable evidence in the record. Moreover, some of their testimony of consequence was actually corroborated by that of the Respondent's witnesses. Further, based upon their demeanor and other facts in the record I found them to be believable and trustworthy as witnesses.

This is not to say that I discredit all of the testimony of the Respondent's witnesses, especially that of Charles Warshaw,[15] where it does not conflict with that of the General Counsel's witnesses. However, I found the Respondent's other witness, Brian Warshaw to be a less than reliable witness, being evasive, belligerent and hostile in answering questions by counsel for the General Counsel on cross-examination, and based upon his demeanor, at times he was less than believable.

Analysis and Conclusions

The amended complaint alleges that the Respondent by its acts and conduct adopted the 1996–1999 and 1999–2002 General Contractors Association of New York, Inc., collective bargaining agreements with the Union, unlawfully withdrew its recognition from the Union, and has refused to adhere to the terms of the 1999–2002 agreement, thereby failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act. The Respondent denies these allegations.

In *E.S.P. Concrete Pumping, Inc.*, 327 NLRB at 712 the Board held that:

[W]e find that the principles of "adoption by conduct" of a

[15] It is not unusual that based upon the evidence in the record, the testimony of a witness may be credited in part, while other segments thereof are discounted or disbelieved. *Jefferson National Bank*, 240 NLRB 1057 (1979) and cases cited therein.

collective-bargaining agreement, properly understood, are applicable to agreements covered by Section 8(f) as well as Section 9(a), and that once an employer has voluntarily adopted a contract, it is foreclosed under John Deklewa & Sons [3] from repudiating it during its term.

[3] 282 NLRB 1375 (1987), enfd. sub nom. Iron Workers *Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

It is well settled that a union and employer's adoption of either an 8(f) or 9(a) labor contract "is not dependent on the reduction to writing of the intention to be bound," but instead," what is required is conduct manifesting an intention to abide by the terms of the agreement." *E.S.P Concrete Pumping,* supra; NLRB v. *Haberman Construction Co.,* 641 F.2d 351, 353–356 (5th Cir. 1981), enfg. 236 NLRB 79 (1978).[16] Moreover, formation of a binding contract on the theory of adoption or notification must be based on some element of mutual consent and obligation. *Haberman Construction Co.,* 236 NLRB at 86.

Under Section 8(f) of the Act, employers and unions in the construction industry are free to repudiate the collective-bargaining relationship once an 8(f) agreement expires by its terms. *James Luterbach Construction Co., Inc.*, 315 NLRB 976, 978 (1994); *John Deklewa & Sons,* supra. However, the Board has held that when a Section 8(f) employer manifests an intention to abide by the terms of a successor collective-bargaining agreement, that employer will be bound to the successor agreement until its expiration. *E.S.P. Concrete Pumping, Inc*., 327 NLRB 711 (1999).

In *E.S.P. Concrete Pumping, Inc.*, supra, the Board found that the employer had voluntarily adopted the collective-bargaining agreement by its conduct in applying the collective-bargaining agreement to the work for a year, held itself out as a union contractor and acquiesced in a judgment against it for unpaid contributions to the Union's pension fund.[17] In *Haberman Construction Co.*, supra, the Board affirmed an administrative law judge, concluding that the employer's consistent contributions to the Union's benefit funds over a period of four years, the exclusive employment of union members, the observation of contractual holidays, the payment of union wage scale, the appointment of a union job steward, and the use of the union for referrals, all reflected an intention to adhere to the union's collective-bargaining agreement.[18] In *Vin James Plastering Co.*, 226 NLRB 125 (1976), the Board affirmed the administrative law judge, concluding that the employer's payment of contractual wages and benefits over a 16-month period, its check off and remittance of union dues, its payment to union benefit funds and the submission of reporting forms stating it was complying with the terms of the collective-bargaining agreement, reflected an intention to be bound by the agreement. Also see, *Marquis Elevator Company, Inc*., 217 NLRB 461, 465–66 (1975), in which the employer remitted contributions to the union's trust funds during the first two years of the contract, adhered to the wage provisions and all the other terms and conditions of the agreement, admittedly " as close as possible" paying a penalty imposed by the Union and continuing to hire its personnel through the union, and discussing and settling grievances with the union business agent, the Board found that the employer adopted the collective-bargaining agreement by its actions.

In the instant case, the evidence shows that until December 31, 1999, the Respondent had complied with virtually all of the terms required by the 1996–1999 and 1999–2002 collective-bargaining agreements. The Respondent employed unit employees Wichrowski and Wozlonis from 1994 and 1997 respectively, both until the end of December 1999, as truckdrivers and on-site stewards for the Union at the Respondent's jobsites, thus apparently holding the Respondent out as a union employer at these projects. See Scandra *Stucco Co.*, 319 NLRB 850 (1995). Both Wichrowski and Wozlonis were paid the prevailing wage rate, which corresponded to the union wage rates, under the Respondent's required bid agreements with the NYSDOT and MTA respectively, but plus $1 per hour extra for acting as union on-site stewards. The Respondent also deducted union dues from these employees pay and forwarded these amounts to the Union, although requested to do so by the employees. The Respondent throughout the period July 1, 1999 to December 31, 1999, while Wichrowski and Wozlonis were employed by the Respondent, the Respondent continued to pay them not only the new wage rates when they were due, but also for holidays as set forth in the 1999–2002 collective-bargaining agreement. Moreover, the Respondent submitted to the Union all necessary forms and pension and welfare contributions, including contributing to the Union's job training fund and, for the first time required as in the 1999–2002 collective-bargaining agreement, a vacation and sick leave fund.[19]

From all of the above, I find that the Respondent adopted the 1999–2002 collective-bargaining agreement by its conduct until the expiration of this agreement. *E.S.P.* supra; *Haberman*,

[16] Accord: *Arco Electric v. NLRB*, 618 F.2d 698 (10th Cir. 1980) (whether particular conduct in a given case demonstrates the existence or adoption of a contract is a question of fact), enfg. 237 NLRB 708 (1980).

[17] See *Haberman Construction Co*., supra, 236 NLRB at 85 (acquiescence in penalties imposed for breach of collective-bargaining agreement an indication of adoption of contract). However, as the Board stated in *E.S.P. Concrete Pumping, Inc*., 327 NLRB at 714:

> We recognize that some nonunion employers may elect to maintain the same wage rates and benefit levels as those prescribed in a collective-bargaining agreement. Nothing in this decision should be read to establish that the Board will find that an employer is bound by an 8(f) agreement merely because it has paid wages and benefits equivalent to those specified in such an agreement.

[18] However, an employer's voluntary payment of union scale wages, and voluntary contributions to union trust funds do not alone constitute ratification of, or adoption of, a collective-bargaining agreement. *Haberman Construction Co*. supra; *Moglia v. Geoghegan,* 403 F.2d 110 (C.A.Z. 1968), cert. denied 394 U.S. 919 (1969).

[19] While the Respondent alleges that the government bid books required it to pay its employees, including Wichrowski and Wozlonis as truckdrivers, the prevailing wage rates and fringe benefits which were equivalent to those in the 1999–2002 GCA Agreement, the Respondent did more than this as set forth above.

supra; Vin James, supra; *Marquis Elevator Company*, supra.[20] Also see, *Jeff McNeff, Inc. v. Todd*, 461 U.S. 260, 270–271 (1983). Being bound by the 1999–2002 collective-bargaining agreement by its acts, the Respondent's withdrawal of its recognition of the Union prior to the expiration of this Agreement and its failure and refusal to adhere to the 1999–2002 agreement, the Respondent has failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act. [21]

The 10(b) period

Section 10(b) of the Act provides "That no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." Section 10(b) is a statute of limitation and is not jurisdictional in nature. It is an affirmative defense which must be pleaded and if not timely raised, is waived. *Federal Management Co., Inc*., 264 NLRB 107 (1982). Also, the burden of proving such an affirmative defense rests squarely upon the party asserting it. *Kellys' Private Car Service*, 289 NLRB 30 (1988); *Chinese American Planning Council, Inc.*, 307 NLRB 410 (1992). Moreover, It is firmly established that the 10(b) period commences when a party has clear and unequivocal notice of the violation of the Act. *District 17, United Mine Workers of America*, 315 NLRB 1052 (1994); *Leach Corp.*, 312 NLRB 990, 991 (1993), enf. 54 F.3d 802 (D.C. Cir. 1995); *A & L Underground*, 302 NLRB 467, 468 (1991), or where a party in the exercise of reasonable diligence should have become aware that the Act has been violated. *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992); *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), cert. denied sub nom. *Gilmore Steel Corp. v. NLRB*, 496 U.S. 925 (1990).

In applying these principles to the instant case, it is the Respondent who has the burden of demonstrating that the Union obtained clear and unequivocal notice that the Respondent withdrew recognition from the Union prior to January 11, 2001, since the charge was filed and served on the Respondent on July 11, 2001. *C. Overaa & Co*., 291 NLRB 589, 590 (1988). The Board has held that "those whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party" are not barred by the Board's requirement that a party promptly file a contract repudiation charge. A & L Underground, supra at 469. Here, the Respondent's own actions failed to put the Union on notice that it had withdrawn recognition from the Union while the Respondent complied for several months with all the substantive terms of the 1999–2002 collective-bargaining agreement.[22]

In reviewing the Respondent's various defenses in which it raises Section 10(b) of the Act, I find that the Respondent has failed to sustain its burden of proof. The Respondent argues that the Union's letter to the Respondent dated January 19, 2000, acknowledged that the Union was aware that the Respondent was no longer a member of the GCA and had not executed the 1999–2002 collective-bargaining agreement. Therefore, since the Union did not file a charge until July 9, 2001, approximately 18 months after January 19, 2000, the charge is barred by Section 10(b) of the Act. However, the Union's acknowledgement of the Respondent's withdrawal from the GCA in and of itself, fails to establish that the Union was also aware that the Respondent had allegedly withdrawn recognition from the Union as well at that time. In fact, Cassel credibly testified that she only sends letters such as the January 19, 2000 letter to employer's whom she believes still have contracts with the Union, and she therefore was unaware that the Respondent had withdrawn recognition from the Union. Also, Gesualdi testified that it is common practice in the construction industry that employers, after withdrawing authority from the GCA, to bargain with a particular union, maintain a direct relationship with that Union. Thus the Respondent's April 24, 2000, designation of the GCA as its bargaining agent specifically excluding the Union only indicated to the Union that the Respondent no longer wanted the GCA to represent it with the Union with direct contact between the Respondent and the Union thereafter to consider grievances and other matters. Therefore, the Respondent's conduct was ambiguous as to its intentions at this point and these documents failed to establish that the Union had clear and unequivocal notice that the Respondent had withdrawn its recognition of the Union outside the 10(b) period. See *Stanford Realty Associates, Inc*., 306 NLRB 1061, 1065 (1992); *Christopher Street Owners Corp*., 286 NLRB 253 (1987), enf'd 926 F.2d 1215 (D.C. Cir. 1991).

In *Stanford Realty*, supra, the union's request that the employer sign a collective-bargaining agreement came more than 6 months prior to the Union's filing of the charge in that matter. However, the Board noted that while the employer did not sign the contract or recognize the Union at that time, *it clearly did not unequivocally refuse to do so*. Finding it noteworthy that

[20] Also see *Fitzpatrick Electric, Inc*., 242 NLRB 739, 742 (1979). In addition to having adhered to successive collective-bargaining agreements for many years without signing them, including, making the appropriate changes in wages and benefits, submitting the appropriate report forms, the Board found that the employer's statement that "as soon as business picks up again, we will be back with the union," constituted additional evidence that the employer considered itself bound by the contract. In the current case the Respondent indicated that when business picked up it would call Wichrowski and Wozlonis, Local 282 truckdrivers, back to work. *Riley Electric, Inc*., 290 NLRB 374 (1988); *Volk & Huxley*, 280 NLRB 219, 227 (1986).

[21] The Respondent may argue that assuming that it has not employed members of the Union since December 31, 1999 nor contributed to the Union's trust funds after that date; informed the Union by letters dated January 31 and March 29, 2001, that it was not a signatory to the 1999–2002 collective-bargaining agreement; failed to appear at the Union's grievance panel on April 10, 2001, regarding an on-site steward at the Essex and Delancy Street project, or to accept the subsequent panels award; refused to employ a Union on-site steward at its Essex and Delancy Street project and other jobsites and asserts that "Beyond CAB's submission of contributions to the Local 282's Funds for a 6-month period, General Counsel failed to elicit any additional evidence to support a finding that CAB adopted the 1999–2002 Association Agreement." From all of the above herein I disagree.

[22] Also see *Cross Island Telephone Services, Inc*., 330 NLRB 19 (1999). (Board adopted the ALJ's finding that the employer failed to give clear and unequivocal notice of repudiation of a contract based, in part, on the employer's conduct in complying with most of the terms of the contract).

the employer continued to make payments into the Union's funds and checked off dues during a 1-year period following the Union's request for the employer to sign its contract, the Board concluded that it was not until, within the 10(b) period, the employer explicitly told the Union that it would not sign the Union's contract, that the 10(b) period began to run.

In *Christopher Street*, supra, as in the instant case, the employer simply ignored the Union's written request to sign a contract or alternatively to negotiate a new agreement. The Board determined that it was not clear at the time that the employer ignored the Union's first written request that the employer was refusing to bargain. The Board excused a 7-month delay between the Union's first and second demand and held the 10(b) period began to run only after the Union's second written demand was refused.

Similarly, in the instant case, it is undisputed that the Union's first and only request to the Respondent for it to sign a contract with the Union came on January 19, 2000. It is also undisputed that the Respondent never replied to this request outside of the 10(b) period, either orally or in writing, clarifying to the Union that the Respondent had withdrawn recognition from the Union and did not intend to have a contractual relationship with the Union from that time forward. Therefore, under the Board's rationale in Stanford Realty and Christopher Street, the Respondent's failure to respond to the Union's January 19, 2000 request to sign a contract directly with the Union failed to provide the Union with clear and unequivocal notice that the Respondent had violated the Act.

Nor did the Respondent's inaction put the Union on notice that it should have inquired further and in the exercise of reasonable diligence would have uncovered sufficient facts to conclude that the Act had been violated. In this regard, the Board in *Christopher Street*, supra, noted that the Union therein might have been well advised to follow up sooner on its initial request. However, it stated that it could not conclude that the Union failed to exercise due diligence in not doing so, reasoning that the Union could reasonably have believed that the employer needed time to consider whether to sign the industry-wide contract. In the instant case, the Union likewise could have reasonably believed that Respondent needed time to consider whether or not to sign a contract directly with the Union.

Additionally, it is undisputed that at the end of December 1999, Respondent "laid off" both Wichrowski and Wozlonis, leaving both with the impression that they would be recalled when the Respondent's business picked up. In fact, Wichrowski testified that Charles Warshaw had confided in Wichrowski, just prior to his layoff, that he was having problems and "[f]inancially the job was not going well." Since two of Respondent's three largest jobs, the World Trade Center job and the Herricks Road job, were approaching completion and the Respondent's business had substantially decreased in the beginning of the year 2000, the Union was neither surprised that the Respondent laid off Wichrowski and Wozlonis, when it did, nor was it alerted when the Respondent failed to recall Wichrowski and Wozlonis after months had passed. Thus, the Respondent's layoff of and failure to rehire the Unit employees failed to give the Union clear and unequivocal notice of the Respondent's withdrawal of recognition.

The Respondent next contends that its actions outside the 10(b) period, in failing to employ Unit members since December 1999, and by refusing to accede to the Union's alleged requests to rehire Wozlonis as an on-site steward at the Respondent's 14th Street subway station modernization job, put the Union on notice that the Respondent had withdrawn recognition from the Union outside of the 10(b) period. I do not agree. Even assuming the Union had notice that the Respondent had breached the provision in the 1999–2002 collective-bargaining agreement requiring it to put an on-site steward on all jobs in excess of $14 million, this alleged unilateral change certainly did not rise to the level of a total contract repudiation. In *A & L Underground*, supra at 469, the Board explained that cases where Section 10(b) would not be a bar include "cases in which a respondent has not given clear notice of a total contract repudiation outside the 10(b) period, but has simply breached provisions of the collective-bargaining agreement to a degree that rises to the level of an unlawful unilateral change in the contractual terms and conditions of employment." Therefore, the Union may have waived its right to file a charge over the Respondent's breach of a provision of the 1996–1999 and 1999–2002 collective-bargaining agreements, by its failing to maintain on-site stewards on some of its jobs in excess of $14 million, but, however, this breach did not rise to the level of a total repudiation by the Respondent.

Moreover, Charles Warshaw testified that in early 2000, Gesualdi called Warshaw "on several occasions" saying he wanted Wozlonis on the 14th Street job. But even assuming Warshaw's account of these conversations, no evidence was adduced establishing that during any one of these alleged conversations, the Respondent informed Gesualdi that the Respondent had withdrawn recognition from the Union.[23] In fact, in January 2001, when the Respondent did finally inform Gesualdi that it was withdrawing recognition from the Union, Charles Warshaw was explicit and recalls notifying Gesualdi, for the first time, that the Respondent "had no agreement with the Teamsters." Moreover, Warshaw put this withdrawal of recognition in writing, by letters dated January 23, 2001 and March 29, 2001. However, Warshaw conceded that he wrote no letters and maintained no phone logs or records confirming the Respondent's withdrawal of recognition from the Union in early 2000 and admitted that he possessed no evidence that he had any conversation with Gesualdi at all during that time period.

From all of the above I find that the Respondent has failed to meet its burden of proving its affirmative defenses that the complaint allegations are time barred under Section 10(b) of the Act.

[23] Compare *Glover Bottled Gas Corp.*, 292 NLRB 873, 885 (1989), enf'd 905 F.2d 681 (2d Cir. 1990), cert. denied 516 U.S. 816 (1995) (In rejecting the employer's testimony concerning the employer's alleged withdrawal of recognition from the Union, the ALJ reasoned that if the employer wished to communicate a withdrawal of recognition, it undoubtedly would have done so in exactly those terms.)

Stable zero employee unit

The Respondent alleges that it was free to repudiate the terms of the 1999–2002 collective-bargaining agreement and withdraw recognition of the Union because the Respondent had a "stable-zero employee unit for a one year period." An employers refusal to bargain with a representative on behalf of a one-man unit does not constitute a refusal to bargain within the meaning of Section 8(a)(5) of the Act. *Kirkpatrick Electric Co., Inc*. 314 NLRB 1047 (1994); *Foreign Car Center, Inc.*, 129 NLRB 319, 320 (1960). If an "employer employs one or fewer unit employees on a permanent basis, the employer, without violating Section 8(a)(5) of the Act, may withdraw recognition from a union, repudiate its contract with the union, . . . without affording a union an opportunity to bargain." *Donnie M. Parris*, 275 NLRB 1403, 1468 (1985); *Stack Electric, Inc*., 290 NLRB 575, 577 (1988); *Cardox Division of Chemetron Corp*., 268 NLRB 335, 336 (1983) Laid-off employees, who do not have a reasonable expectation of reemployment within a reasonable time in the future, are not considered a part of an appropriate unit, *Donnie M. Parris*, supra.

The Respondent in its brief asserts, "The evidence adduced at trial clearly indicates that after December 28, 1999, CAB had a stable zero employee unit through January 21, 2001, a period of approximately 13 months. Assuming arguendo, that CAB was bound to the 1999–2002 Association Agreement, Gesualdi's January 2001 request that CAB employ Wozlonis as an on-site steward at Essex Street, would have caused CAB to have only one unit employee in the bargaining unit. . . . Even assuming arguenda that CAB was bound to the 1999–2002 Association Agreement, it was free to repudiate the contract as it had a stable zero employee unit for 13 months and was not required to recognize or bargain with Local 282 concerning a one-man unit in January 2001. Because CAB was free to unilaterally terminate the 1999–2002 Association Agreement, there can be no finding that CAB violated Sections 8(a)(1) and (5) of the Act by failing to bargain with Local 282." I do not agree.

"In a unit of employees involving a normal fluctuating demand for employees, as in building and construction work, the employee work force is deemed to be that of employees who are actively working and those who have a reasonable expectation of further employment even though on layoff status." *Finger Lakes Plumbing & Heating Co., Inc*., 253 NLRB 406, 410 (1980). In determining whether employees had a reasonable expectation of recall, the Board examines several factors, including the employer's past experience and future plans, the circumstances surrounding the layoff and what the employees were told about the likelihood of recall. *Apex Paper Box Co*., 302 NLRB 67, 68 (1991).

Here, the Respondent is a general contractor in the construction industry, with a history of a normal fluctuating demand for employees. Both Wichrowski and Wozlonis were employed by the Respondent for several years on its different projects both as truckdrivers and union on-site stewards transferred to another jobsite when the one they were working on neared completion. Wichrowski testified credibly that when he was laid off by owner Brian Warshaw at the end of December 1999, while working at the Respondent's Old Country Road project, he was told by Warshaw that there was no more work and he was sorry that he had to let me go . . . . He said that he would hope to get some new jobs, new contracts, and we would go back to work," "we" being other Teamsters who had also been laid off. Wozlonis' was also laid off at the end of December 1999. The credited testimony of Wozlonis indicates that Brian Warshaw told him that Warshaw was laying Wozlonis off for "lack of work" and that Warshaw would call him back to work" when there was more work coming about." Wozlonis added that his layoff occurred towards the end of the job and that he believed that he would be called back to work for the Respondent at some future time. It is significant that Brian Warshaw failed to tell either man that they were being laid off because the Respondent no longer recognized the Union.

Taking into account the Respondent's past experience and future job acquisition, past hiring practices and what the Respondent told Wichrowski and Wozlonis when they were laid off, leads to the inescapable conclusion that these employees possessed a reasonable expectation of being recalled back to work for the Respondent. Therefore, their layoffs resulted in a temporary reduction of the Respondent's workforce, and not, a stable zero-employee unit. *Apex Paper Box Co*., supra; *Finger Lakes Plumbing & Heating Co., Inc*., supra.

Moreover, in finding herein that the Respondent adopted the 1999–2002 collective-bargaining agreement by its conduct, that agreement required that the Respondent employ a unit employee to act as a union on-site steward on the Respondent's projects worth more than $14 million. The Respondent, since it laid off Wichrowski and Wozlonis at the end of December 1999, has continued to work on at least four projects worth more than $14 million each but has refused to hire a Union on-site steward on any of them.[24] Had the Respondent not committed unfair labor practices by unilaterally refusing to employ Union on-site stewards after January 2000 under the provisions of the 1999–2002 Agreement on at least four of its projects, it is submitted that upwards of perhaps four unit employees would have been employed by the Respondent in the appropriate unit. Since the Respondent has unlawfully refused to hire these on-site stewards, its claim of a "stable zero-employee unit" must be rejected. "It is an elementary proposition of law that no one may assert a defense predicated on his own unlawful conduct." *Barwise Sheet Metal Co., Inc.*, 199 NLRB 372, 379 (1972). Also see *Glover Bottled Gas Corp.*, 292 NLRB 873 (1989), enf'd 905 F.2d 681 (2d Cir. 1990), cert. denied 516 U.S. 816 (1995).

Additionally, In *John Deklewa & Sons*, supra at 1389 fn 62, the Board stated, "An 8(f) contract is enforceable throughout its term, although at a given time there may not be any employees to which the contract would apply." (The Board found that even though the employer employed no unit employees for a full 8 months prior to the date on which the parties submitted their stipulated facts, the 8(f) agreement therein was enforceable nonetheless). Similarly, even though the Respondents' unit work force has been temporarily reduced to zero, the

[24] Herricks Road project, 14th Street and 8th Avenue project, Essex and Delancy Street project, and SUNY Old Westbury project.

1999–2002 collective-bargaining agreement, adopted by the Respondent by its conduct, is enforceable nonetheless and the Respondent's affirmative defense alleging that it maintained a stable, zero-employee unit is denied.

From all of the above I find and conclude that by refusing to adhere to the terms of the 1999–2002 collective-bargaining agreement and withdrawing its recognition from the Union, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. With respect to the latter, the Respondent shall be ordered to revoke its withdrawal of recognition of the Union and instead recognize and bargain with the Union as the collective-bargaining representative of any of its employees in the appropriate bargaining unit and abide by the terms of the 1999–2002 collective-bargaining agreement between the GCA and Local 282.

It shall also be ordered to make whole all employees represented by Local 282 in the Unit who should have been assigned work on the Respondent's projects pursuant to the terms of the 1999–2002 collective-bargaining agreement, for any losses suffered as a result of the Respondent's unlawful failure to comply with the terms of that Agreement, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Furthermore, the Respondent shall be ordered to make whole the appropriate Union and fringe benefit funds for losses suffered as a result of the Respondent's delinquencies in failing to make contractually required contributions to those funds during the 1999–2002 collective-bargaining agreement. *Diversified Bank Installations*, 324 NLRB 457 (1997).

Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act. I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, CAB Associates, is now and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Building Material Teamsters Local 282, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully withdrawing recognition from the Union and refusing to abide by the terms of the July 1, 1999 to June 30, 2002 collective-bargaining agreement between the GCA and the Union, which the Respondent adopted by its acts and conduct, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I make the following recommended[25]

ORDER

The Respondent, CAB Associates, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from Building Material Teamsters Local 282, International Brotherhood of Teamsters, AFL–CIO.

(b) Unlawfully refusing to adhere to the terms of the 1999–2002 collective-bargaining agreement between the GCA and Local 282 which the Respondent adopted by its acts and conduct.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Building Material Teamsters Local 282, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the Respondent's employees in a unit of full-time and regular part-time automobile chauffeurs and euclid and turnapull operators, excluding all clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) Honor the terms of the 1999–2002 collective-bargaining agreement between the General Contractors Association of New York, Inc. (GCA) and the Union.

[25] If no exceptions are filed, regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes as provided by Sec. 102.46 of the Board's Rules

(c) Make whole its employees, the Union, and fringe benefit funds, in the manner set forth in the Remedy section, for any losses they may have suffered as a result of the Respondent's failure to adhere to the terms of the 1999–2002 collelctive-bargaining agreement between the GCA and Local 282, with interest on amounts owing.

(d) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its College Point, New York place of business copies of the attached notice marked "Appendix."[26] Copies of the notice on forms provided by the Regional Director for Region 29, after being signed by it duly authorized representative shall be posted by CAB Associates, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, CAB Associates has gone out of business, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since July 9, 2001.

(f) Within 14 days after service by the Regional Director for Region 29, sign and return to the Regional Director sufficient copies of the notice for posting by the Union, it being willing, at all locations where notices to its members are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated, Washington, D.C. July 2, 2002

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Building Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO, by withdrawing recognition from the Union as the exclusive representative of our full-time and regular part-time automobile chauffeurs and euclid and turnapull operators, excluding all clerical employees, guards, and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT refuse to comply with the contract terms of the 1999–2002 collective-bargaining agreement between the General Contractors Association of New York, Inc. and the Union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of any of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the Union concerning wages, hours, hours of employment and other terms and conditions of your employment.

WE WILL make our employees, the benefit funds, and the Union, whole for our failure to follow the terms of the 1999–2002 collective-bargaining agreement.

CAB ASSOCIATES